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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



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| In the Matter of | ) | |
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| Amendment of the Commission's Rules Regarding Multiple Address Systems | ) | WT Docket No. 97-81 |

# COMMENTS OF S AND K ENTERPRISES

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**COMMENTS OF S AND K ENTERPRISES**

S and K Enterprises ("S&K"), by counsel and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.

## I. Introduction

S&K is comprised of two telecommunications entrepreneurs who seek to provide service using the Multiple Address System ("MAS") frequencies. In December of 1991, S&K filed a total of 39 FCC Form 402s for MAS Licenses in the 932/941 MHz band. Those applications were assigned file numbers, but have never been processed by the Commission. Their status has been identified as "pending" in the Commission records for the past five years.

S&K is interested in this proceeding because it **still**, more than five years after filing its MAS applications, desires to provide service on the 932/941 band at the locations for which it has already applied. S&K's comments are limited to responding to the NPRM's tentative conclusion that the 50,000 pending MAS licenses should be dismissed.

## II. THE FCC SHOULD PROCESS THE PREVIOUSLY FILED APPLICATIONS

Back in January and February of 1992, numerous applicants filed MAS applications in response to a number of MAS filing windows. In establishing a filing window procedure the Commission stated that its intent was to "fashion filing procedures that enable [the] expeditious processing of applications." In the Matter of the Commission's Rules to Establish Service and Technical Rules for Government and non-Government Fixed Service Usage of the Frequency Bands 932-935 MHz and 941-944 MHz, 4 FCC Rcd 2012, 2014 (1989). The applicants expended considerable time, effort and money to put together applications in the good faith belief that the Commission would act upon them. Sites were secured, measurements taken, and engineering analysis performed.

The Commission, rather than embark upon the admittedly arduous task of culling out the mutually exclusive applications, sat on all of the applications for more than five years. The Commission is not now proposing to finally process the applications, but instead seeks to dismiss the applications and start over. What is most troubling is that the Commission has waited five years to determine that it is too much trouble to process the applications and that an auction would be faster. S&K respectfully submits that had the FCC processed the applications contemporaneously with their filing, these MAS facilities would have been providing service for several years.[1]

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[1] It is ironic that the FCC's "solution" to this "problem" is an auction which would raise more revenue than would traditional filing fees. However, there is a significant hidden cost in such a course of action. For years the FCC successfully instilled confidence in auction applicants that the rules and auction process

The only reasonable approach is for the Commission to sort through the previously filed applications and grant licenses.[2] After granting the licenses, the Commission should treat the new licensees as "incumbent licensees" entitled to the same protection as existing licensees. The areas that remain unserved after the pending applications have been licensed could then be auctioned off. Such an approach would allow the Commission to proceed with its plan for geographic area licensing through auction, but would first protect the rights of those who have patiently waited for Commission action on their applications.

## III. IF FREQUENCIES ARE TO BE AUCTIONED, THE AUCTION SHOULD BE OPEN ONLY TO PREVIOUSLY FILED APPLICANTS

If the frequencies are to be auctioned, the auction participants should be limited. Only those with MAS applications on file should have the authority to take part. The applicants have a concrete interest and continued investment in the frequencies at issue. It is unjust to open the auction to anyone and everyone.

This approach supports the Commission auction rationale of awarding the license to the applicant who most values it. NPRM at ¶ 51. Where there exist two or more mutually exclusive

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would be clear and predictable. This was accomplished, which resulted in applicants maximizing their bids. If the FCC adopts its tentative conclusion and unjustly jettisons the pending MAS applications, the confidence factor that the Commission has been so successful in fostering will be significantly diminished. To the extent that future auction applicants believe that the FCC might jettison their applications as well, the applicants may well determine either not to participate or to devalue the opportunity.

[2] Any mutually exclusive applications would be granted pursuant to a lottery, rather than an auction.

applications in any given area, the area would be awarded to the highest bidder.

## IV. IF THE PENDING APPLICATIONS ARE DISMISSED, THE APPLICANTS ARE ENTITLED TO A FULL REIMBURSEMENT OF THEIR FILING FEES

If the applications are to be returned, the interests of equity demand that the application fees be returned. First, by jettisoning the applications, the Commission would receive an unjust windfall, as the FCC utilized filing fees but failed to process the applications to grant.[3] Second, by failing to return the filing fees, the Commission would be discriminating against each pending applicant. If the pending applicants sought to file for inclusion in the auction, they would be the only members of the public forced to pay twice for the privilege of becoming MAS licensees.[4] Applicants should be rewarded, not punished, for following the Commission's rules the first time around.

## V. CONCLUSION

S&K applauds the Commission's efforts in finally moving forward with the licensing of the MAS frequencies. Unfortunately, the approach proposed is grossly unfair and unjust. S&K proposes

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[3] In 1991, more than 50,000 MAS applications were filed with the Commission. At a cost of $155.00 per application, the Commission received more than $7,750,000.00 in filing fees. A filing fee is to "reflect only the direct cost of processing the typical application of filing," as set forth by the Commission in Establishment of Fee Program, 67 RR 2d 873 (1990). As the Commission did little more than assign a file number to each application, retaining the 7.75 million dollars in filing fees would allow it to unjustly profit from its inaction. Even if it only refunds the filing fees, the Commission received the benefit of a $7,750,000 five year, interest-free loan.

[4] Such disparate treatment could be found to be arbitrary and capricious.

that the Commission act on the pending applications before moving forward with its auction plans. In the alternative, any auction for the frequencies in question should be strictly limited to those who previously filed for them. At the very least, if the FCC dismisses the MAS applications, the Commission should refund the fees submitted for the processing of applications which were never processed. The Commission has a duty to consider the interests of all interested parties, especially those who have followed the Commission's Rules and waited patiently for action.

Respectfully submitted,

S AND K ENTERPRISES

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